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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

DATE: MAY 0 1 2012 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability in the sciences. The petitioner seeks employment as a research scientist at the California Department of Pesticide Regulation (DPR), Sacramento. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner claims eligibility for classification as an alien of exceptional ability in the sciences. The record readily establishes that the petitioner, whose occupation requires at least a bachelor's degree and who holds three post-baccalaureate degrees, qualifies as a member of the professions holding an advanced degree. Therefore, an additional determination regarding the petitioner's claim of exceptional ability would be moot, having no effect on the outcome of the decision. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the

Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on July 9, 2010. The petitioner's initial filing included a "List of [the petitioner's] publications" including six titles. Only three of the listed titles had actually been published, one in a peer-reviewed journal and two on the web sites of state government agencies where the petitioner worked at the time of publication. The other three titles were at various stages of peer review. The petitioner's published journal article, dating from 1995, did not

relate to the petitioner's current research regarding the effects of pesticide exposure. Rather, the article concerned "transmissible gastroenteritis virus in US swine herds."

Several letters also accompanied the petition. Only one letter bears an original signature; the others are photocopied or electronically reproduced. Excerpts follow, to give a sense of the nature of the petitioner's work. Representative Mike Thompson, in an electronically signed letter, provided an outline of the petitioner's work:

> He currently works as [redacted] His job focuses on observing workers who are exposed to chemical, biological or physical agents and [determining] if the contact produces negative side effects. [The petitioner] also compiles data and analyzes trends and incident reports from workplaces, homes and agricultural settings to prevent future illnesses and injuries caused by the use of pesticides.
>
> The information he compiles is used by the Environmental Protection Agency [EPA], the Center [sic] for Disease Control, the Food and Drug Administration and the National Institute of Occupation Safety and Health. [The petitioner] developed an online application that gathers data related to illness and injury caused by pesticide usage, this application is called California Pesticide Illness Query (CalPIC) [*sic*], and he is one of two people qualified to run the query. Much of this information is given to the EPA, the Department of Pesticide Regulation and California Agricultural Commissioners and Sealers Association, as these agencies have a three-way cooperative agreement with [the petitioner].

[redacted] claimed no subject matter expertise in the petitioner's field, and did not specify how he came to have knowledge of the factual assertions in his letter. The remaining witnesses all work for state or federal government agencies in California. In a photocopied letter, [redacted], stated: "I . . . oversee the work product of [the petitioner] and his colleagues in PISP," DPR's Pesticide Illness Surveillance Program. [redacted] discussed PISP's role at length, stating: "PISP data . . . plays a major role in federal legislation and rulemaking," and provides data to numerous government agencies around the country, and to other nations as well.

The overall significance of the role of DPR or PISP is not at issue in this proceeding. There is no dispute that testing pesticides for hazards has substantial intrinsic merit, and the dissemination of the findings gives the work national scope. Nevertheless, there is no blanket waiver for DPR employees in either the statute or the regulations. Therefore, for the petitioner to qualify for the national interest waiver, it cannot suffice to show that DPR or PISP researchers perform important work. The petitioner must demonstrate that his track record of accomplishment sets him apart from other qualified professionals in his field, such that it would be in the national interest to retain his services.

With respect to the petitioner's individual work, [redacted] stated:

> PISP data is being used to develop regulations for soil fumigants. [The petitioner's] work on illnesses associated with chloropicrin will be crucial in modifying permit conditions for the use of the pesticide. Should the use of methyl iodide . . . be approved in California, [the petitioner] will be tracking and analyzing illness trends associated with it. . . .
>
> In 2009, DPR made available California Pesticide Illness Query (CalPIQ), an online application that retrieves the most frequently requested information from the PISP database. [The petitioner] wrote the online user guide and has been instrumental in developing, implementing and administering the application. [The petitioner's] knowledge of the program, as well as his understanding of the complex database structure, makes him one of only two people in our Department who are qualified to make complex queries to the database and provide select information to the U.S. EPA and others. . . .
>
> [The petitioner] has become known as California's point of contact for pesticide illness information. . . .
>
> [The petitioner] is responsible for providing formal training to the approximately 400 biologist [*sic*] on how to conduct illness investigations.

With respect to the national interest waiver, [redacted] stated:

> It would be extremely difficult to find someone with [the petitioner's] particular combination of skills and knowledge. We are convinced that using limited budget resources and staff time to engage in recruitment for his position would not result in finding a qualified candidate and would divert important resources from our program.

Nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the labor certification process. *NYSDOT*, 22 I&N Dec. 223. [redacted] contention seems to be that the recruitment process would not yield any qualified United States workers, and therefore it would be a waste of time and resources to apply for a labor certification that is sure to be approved. The record contains no evidence that the employer has tested the labor market or otherwise corroborated the above claims about the anticipated results of a hypothetical recruitment effort.

[redacted], staff toxicologist at the California Environmental Protection Agency, stated:

> I have come to know of [the petitioner's] analysis and work in epidemiology while working with the Department of Pesticide Regulation (DPR) on pesticide illness complaints that resulted from aerial spraying against the Light Brown Apple Moth. . . . What began as a deceptively simple pest eradication program, turned into a widely covered and highly controversial media event. [The petitioner] took on the

> task of reconciling thousands of illness complaints/reports from various sources and identifying possible cases. He developed criteria for case selection and exclusion, and developed a database to reconcile duplicative reports and to track illnesses.
>
> . . . Together with other experts from other state agencies, [the petitioner] used epidemiology and science to impartially analyze and characterize the collected data.
>
> . . . The Pesticide Illness Surveillance Program is part of DPR's Worker Health and Safety program, widely regarded as the most demanding in the nation. [The petitioner] is exceptional in that he is not only an epidemiologist with the requisite background in medicine and public health but he also has extensive experience in pesticide use enforcement. In addition, his degree in conservation biology provides him with a solid grasp of environmental issues that go hand-in-hand with pesticide regulation.

[redacted] currently chief of the Food, Drug, and Radiation Safety Division of the California Department of Health, previously interacted with the petitioner as [redacted] In a photocopied letter, [redacted] described some of the petitioner's specific projects, such as a collaboration with officials in Mexico to track "pesticide illnesses and injuries that may occur in California but are not recorded because the affected person or persons may seek care in Mexico" and the petitioner's service on "California's Vector Control Advisory Committee . . . to provide guidance on vector control issues that cross with pesticide use issues." [redacted] asserted:

> [The petitioner's] research and illness surveillance contribution had made a highly positive advancement to various state programs, federal agencies, private physicians, and most importantly to agricultural and construction pesticide workers and to the public exposed to pesticide products. . . .
>
> Because of [the petitioner's] unique extensive and diverse experience, education . . . , perspectives, tenacity, and dedication in his pesticide illness research and surveillance, his contribution would be very difficult to match with our equivalent matching workforce with roughly equivalent experience.

[redacted] is a medical consultant with DPR's Worker Health and Safety Branch, as well as a faculty member at the Center for Health and the Environment at the University of California, [redacted] His electronically reproduced signature appears on a letter that discussed the petitioner's previously mentioned projects relating to spraying for the light brown apple moth and the development of CalPIQ, and repeated the assertion that other jurisdictions frequently rely on pesticide illness data gathered in California.

A photocopied letter attributed to [redacted], manager of the Worker Safety Program for EPA Region 9, signed by [redacted] on her behalf, reads in part:

> I have come to know of [the petitioner's] work in pesticide illness epidemiology through the U.S. Environmental Protection Agency's cooperative work plan agreement with the California Department of Pesticide Regulation (DPR).
>
> [The petitioner] is currently involved in two major projects as part of that cooperative work plan agreement. One of [the petitioner's] projects is to analyze pesticide illnesses and injuries designated as "priority" episodes in a three-way Memorandum of Agreement between DPR, the California Association of Agricultural Commissioners and Sealers Association (CACASA) [*sic*],[1] and the EPA, Region 9. . . . By analyzing priority episodes from the last 5 years, [the petitioner] will identify recurring risk factors that may have contributed to the episodes and make specific recommendations to help avoid future occurrences of similar illnesses and injuries. Recommendations may range from improved worker/public education and outreach to product label changes to changes in laws and regulations. . . .
>
> [The petitioner's] other project involves a retrospective analysis of pesticide illness and injury trends amongst field workers to assess the federal Worker Protection Standards (WPS). . . . By focusing on two intervals (1984-1988 and 1999-2003) that represent pre and post implementation of the federal Worker Protection Standards (WPS), [the petitioner] can use California's pesticide illness and injury data to assess the effectiveness, and shortcomings, of the federal Worker Protection Standards.

The letters quoted above described various aspects of the petitioner's job duties, and left little doubt as to the intrinsic merit and national scope of the position. The letters, however, offered considerably less information to explain why the petitioner, in particular, serves the national interest to a substantially greater extent than a qualified United States worker would in the same position. Many assertions to that effect focused on the petitioner's training and background, and a number of witnesses stated that the petitioner is one of only two people qualified to make complex queries using CalPIQ.

On January 11, 2010, the director issued a notice of intent to deny the petition. The director acknowledged the intrinsic merit and national scope of the petitioner's occupation, but found that the petitioner had not established the extent of his impact on his field. The director acknowledged the importance of the petitioner's functions, but found that the petitioner had not shown that it is in the national interest for him, rather than a qualified United States worker, to perform those functions.

In response to the notice, the petitioner submitted further copies of his professional writings, both journal articles and official reports, and evidence of four citations of his 1995 journal article. As noted previously, that article predates the petitioner's work with DPR and has no demonstrated relevance to his present work on pesticide-related illnesses and injuries.

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[1] Other materials in the record show that the acronym "CACASA" stands for "California Agricultural Commissioners and Sealers Association."

Counsel asserted that the petitioner performs a number of key duties at DPR, and counsel quoted from several of the initial witness letters. Counsel then discussed how the petitioner qualifies for the underlying immigrant classification. The director had not contested any of these points. Counsel then discussed, at length, how the petitioner's work has substantial intrinsic merit and national scope, even though the director had specified that "[a]dditional evidence . . . is not necessary" in that regard because the petitioner had satisfactorily established those points.

Counsel stated that the petitioner "has a record of past accomplishments from which it can be concluded that he will serve the national interest to a greater extent than other research scientists with an educational level, training, experience, and credentials similar to his." Counsel then repeated several of the petitioner's achievements described earlier. This list, however, merely catalogs his accomplishments; it does not show that he will serve the national interest to a greater extent than a qualified United States worker.

The petitioner submitted photocopies of two further witness letters. In the notice of intent to deny, the director had noted that [redacted] did not sign her own letter, and that the letter did not appear on EPA letterhead. The petitioner submitted a second copy of the letter, with [redacted] photocopied signature. [redacted], environmental program manager at DPR, stated: "I had asked [redacted] [*sic*] to write a letter for [the petitioner] and although she had written the letter on July 9, 2010, she forgot to sign the letter before she emailed it." The petitioner submitted materials from EPA, indicating that ethics rules did not permit the use of EPA letterhead on letters written in support of immigrant petitions because the EPA, as an agency, did not officially endorse such petitions; the witnesses made their statements as individuals, not in an official capacity.

[redacted] worked with the petitioner on the aforementioned "California/Baja California Integrated Pesticide Illness Surveillance and Exposure Prevention Project," stated that the petitioner's "expertise and dedication proved to be instrumental to the ultimate success of the project. . . . Without [the petitioner's] skillset, we would not have been able to implement the strategy, let alone devise the plan." [redacted] did not elaborate as to the nature of the petitioner's contributions or how they were beyond the capacities of other epidemiologists. A copy of the project report acknowledged the "superb collaboration and valuable contributions" of 11 contributors, including the petitioner (and [redacted] out of a total of 17 "project participants," an acknowledgement that does not distinguish the petitioner from the majority of those participants.

The director denied the petition on July 26, 2011. The director quoted from several witness letters and discussed exhibits such as the petitioner's articles and reports, but found that the petitioner had not objectively set himself apart from other productive and qualified scientists working in his field.

On appeal, counsel protests that the director imposed novel and overly stringent evidentiary requirements. Specifically, the director found that some of the petitioner's published work was not peer-reviewed, and that the petitioner had not shown that his work "has resulted in findings of major significance to [his] field." Counsel states that the statute, regulations and case law do not justify

these specific grounds for denial of the petition, and that many of the stated grounds relate to a higher priority immigrant classification relating to aliens of extraordinary ability.

The record offers some support for counsel's concerns. The director occasionally used language that appears to derive from the USCIS regulations at 8 C.F.R. § 204.5(h)(3), relating to aliens of extraordinary ability under section 203(b)(1)(A) of the Act. For instance, the director stated that the petitioner had not shown that his articles appeared in a "professional publication, trade publication, or other major media" – language taken directly from 8 C.F.R. § 204.5(h)(3)(iii). The petitioner does not seek classification as an alien of extraordinary ability, and the director therefore cannot deny the petition based on the petitioner's failure to meet the evidentiary standards of that classification.

Setting aside the director's reference to inapplicable regulatory criteria, as well as the seemingly arbitrary finding that the petitioner's government reports lack weight because they were not peer-reviewed, there remain several observations that the director made regarding witness letters. The director, for example, stated: "While [redacted] illustrates that [the petitioner's] work is unique, she does not explain how [his] work is above other similarly situated U.S. workers in the field." The director found that the witnesses essentially described the overall importance of the position and declared the petitioner to be qualified to hold that position. This finding, that qualification for an important position does not translate into eligibility for the waiver, is consistent with statute, regulations and *NYSDOT*.

Similarly, the director pointed to a lack of evidence of implementation of the petitioner's findings. This is a relevant consideration, as it relates to the extent of the petitioner's influence on the field. Counsel, on appeal, asserts that the petitioner has submitted evidence of "a national reputation in [his] field," but, to support this claim, cites the petitioner's participation in three regional "conferences and partnerships." Counsel fails to explain how the petitioner's work with authorities in California and neighboring states demonstrates "a national reputation."

A similar problem befalls counsel's assertion that the evidence in the petitioner's favor "is overwhelming." The discussion that ensues does little more than describe some of the petitioner's past projects, such as when he dealt with the unexpected public backlash from spraying to control the light brown apple moth. Nothing in the description of the projects inherently demonstrates the petitioner's eligibility for the waiver, because these descriptions offer no objective way to compare the petitioner to other qualified professionals in his highly specialized area of expertise. It cannot suffice simply to list the petitioner's qualifications and achievements and declare them to be superior to the never-specified qualifications and achievements of others in his field.

The record establishes beyond dispute that the petitioner has, as counsel states, worked "on critical interstate and international projects," but this involvement appears to be part and parcel of his inherent responsibilities as a researcher for a government agency. There is no blanket waiver for employees of government agencies, and the only material the petitioner has offered that compares him with others consists of witness letters, mostly from colleagues.

The Board of Immigration Appeals (BIA) has held that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The BIA also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

The opinions of experts in the field are not without weight and have received consideration above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may, as above, evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795; *see also Matter of V-K-*, 24 I&N Dec. 500, 502 n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The record provides no objective corroboration for the key contention in the witness letters, which is that the petitioner stands above his peers to such an extent that it is in the national interest to exempt him from the job offer requirement. That requirement includes labor certification which, according to [redacted], the petitioner would likely obtain because "recruitment for his position would not result in finding a qualified candidate."

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.